PUBLIC BANK BHD

v.

NIK CHEE KOK & ORS

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI J
[SUIT NO: S3-22-283-1996]
2 APRIL 2003

LIMITATION: *Striking out action on ground of time bar - Accrual of cause of action- When time began to run - Whether from earliest date on which plaintiff could have sued defendant - Whether from first notice of demand - Whether plaintiff's action statute-barred - Limitation Act 1953, s. 6(1)(a)*

CONTRACT: *Consideration - Past consideration - Whether sufficient consideration - Whether guarantee valid although related to past consideration - Contracts Act 1950, s. 2(d)*

This was the plaintiff's claim against the third defendant as a guarantor due to the borrower's failure to repay a loan. The third defendant argued that the plaintiff's claim against him was statute barred pursuant to s. 6(1)(a) of the Limitation Act 1953 which provides that no action founded on a contract shall be brought after the expiration of six years from the date on which the cause of action accrued. Further, the defendant contended that the said guarantee was also null and void for past consideration since the plaintiff had released the said loan to the borrower before the said guarantee was signed.

Held:

[1] The plaintiff had issued a total of three demands to the third defendant, the first dated 2 April 1986, followed by another demand on 15 May 1986 and thereafter 20 July 1993. The liability of the third defendant under the guarantee arose from the first demand dated 2 April 1986. That was the time when the plaintiff's cause of action against the third defendant accrued *ie*, the time when the plaintiff could have legally filed a claim against the third defendant. In this case, the plaintiff had filed an action against the third defendant on 12 June 1996 which was clearly beyond six years from the date of the first demand. Therefore, the plaintiff's claim against the third defendant was time barred by virtue of s. 6(1)(a) of the Limitation Act 1953. (pp 404 g, 408 g & 409 a-b)

[2] It was held in *South East Asia Insurance Bhd v. Nasir Ibrahim* that the use of the words "has done or abstained from doing'' in s. 2(d) Contracts Act 1950 ('the Act') showed that the act recognised the principle that past consideration is good consideration if it comes at the request of the promisor. Hence, the court ruled that the guarantee here was valid even though it was related to past consideration. However, since the plaintiff's claim was already time barred, it was therefore struck off with costs. (pp 410 h & 411 d-e)

[Claim struck off with costs.]

Case(s) referred to:
Lampleigh v. Braithwait [1615] Hobart 105 ***(refd)***
Mok Hin Wah & Ors v. UMBC Bhd [1987] 2 MLJ 610 ***(refd)***
Nik Che Kok v. Public Bank Bhd [2001] 2 CLJ 157 CA ***(refd)***
Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri Wan Rashid v. Kwong Yik Bank [1989] 3 MLJ 155 SC ***(refd)***
Pao On v. Lau Yiu Long [1980] AC 614 ***(refd)***
South East Asia Insurance Bhd v. Nasir Ibrahim [1992] 4 CLJ 1801; [1992] 1 CLJ (Rep) 295 SC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 2(d)
Limitation Act 1953, s. 6(1)(a)
Rules of the High Court 1980, O. 18 r. 19

For the plaintiff - Barry Goh Meng Yew; M/s Iza Ng Yeoh & Kit
For the 3rd defendant - Tabian Tahir; Tabian Tahir & Co

[The plaintiff has appealed vide Civil Appeal No: W-02-427-2003]

Reported by Suhainah Wahiduddin

JUDGMENT

Ramly Ali J:

The Plaintiff's Claim

At the request of Nik Seng Development Sdn. Bhd. (the borrower), the plaintiff on 5 October 1982 granted to the borrower a fixed loan facility for RM5,500,000 for the purpose of enabling the borrower to complete its housing project. By a letter of guarantee dated 29 December 1982 and in consideration of the plaintiff granting the above fixed loan facility to the borrower, the 1st, 2nd, and 3rd defendants "jointly and severally agreed to pay on demand to the plaintiff all money including interest which is or may during the operation

of the guarantee be owing to the plaintiff from the borrower or remain unpaid on the general balance of the borrower's account to the extent of RM6,000,000." The said guarantee was a "Continuing Guarantee." As additional security for the said loan the borrower has also charged its land held under Lot 4470, 4471, 5614 and 5615, Behrang Station Estate, Mukim Ulu Bernam, Daerah Batang Padang, Perak.

On 3 December 1982 (ie, before the said guarantee was executed) the plaintiff has disbursed RM4,000,000 of the said loan to Oriental Bank in order to satisfy the borrower's loan earlier taken from Oriental Bank and to discharge the charge on the said land.

The borrower failed to repay the loan. The plaintiff through its solicitors issued a letter of demand dated 2 April 1986 (first demand) to the borrower and all the three guarantors. Subsequently, the plaintiff issued another letter of demand dated 15 May 1986 (second demand) to the borrower and all the three defendants. The plaintiff then filed an action in Kuala Lumpur High Court *vide* Guaman Sivil No: C1-23-3411-1986 against all the three guarantors based on the guarantee. On 28 January 1992 the plaintiff withdrew the action with liberty to file afresh and it was granted by the court. Subsequently on 20 July 1993, the plaintiff sent another letter of demand, (third demand) to all the three guarantors demanding for the payment of RM5,000,000 (as at 19 July 1993) based on the same guarantee. On 12 June 1996, the plaintiff refiled the action against all the three guarantors (as defendants) based on the said guarantee.

On 2 June 1997, the plaintiff discontinued the action against the 2nd defendant. Both the 1st and 3rd defendant had applied for the plaintiff's action against them be struck out under O. 18 r. 19 of the Rules of the High Court 1980 (RHC) on the ground that the plaintiff's claim was statute barred by virtue of s. 6(1)(a) of the Limitation Act 1953. The learned SAR granted the application. The plaintiff then appealed to the judge-in-chambers against the said decision of the SAR. The judge-in-chambers allowed the appeal by the plaintiff and accordingly reversed the SAR decision on the ground that there are triable issues and the case is not one fit to be struck out under O. 18 r. 19 RHC. The 1st defendant then further appealed against the said decision of the judge-in-chambers to the Court of Appeal. However, the 3rd defendant did not file any appeal against the said decision of the judge-in-chambers. On 8 March 2001, the Court of Appeal allowed the 1st defendant's appeal on the ground that the plaintiff's claim was time barred, and accordingly the plaintiff's claim against the 1st defendant was struck out, leaving the plaintiff's claim against the 3rd defendant to be determined by this court. The plaintiff then applied for leave to appeal to the Federal Court against the decision of the Court of Appeal, but the application was dismissed by the Federal Court.

The Defence

The 3rd defendant argued that the said guarantee was null and void for past consideration since the plaintiff had released the said loan to the borrower before the said guarantee was signed. The 3rd defendant also argued that the plaintiff's claim against him is statute barred pursuant to s. 6(1)(a) of the Limitation Act 1953.

Issues To Be Determined

Both parties have agreed to the following issues to be determined by the court, namely:

i) whether the plaintiff's claim against the 3rd defendant is time barred; and

ii) whether the guarantee was valid for past consideration.

Whether The Plaintiff's Claim Is Time Barred

Paragraph 1 of the guarantee clearly provides that the guarantors "will pay you (the plaintiff) on demand all money ...". A guarantee of this nature is known as an "on demand guarantee". It is trite law that the liability of the guarantor on this type of guarantee is based on the demand made by the plaintiff. The guarantor is only liable under the guarantee if a demand has been made. In other words, the plaintiff's cause of action against the 3rd defendant (as a guarantor) only arises upon demand made against the 3rd defendant after the borrower has defaulted in its payment. The Supreme Court in *Mok Hin Wah & Ors v. UMBC Bhd.* [1987] 2 MLJ 610, at p. 611 had made the following rulings:

> The reason is that in the letters of guarantee the provisions about demand are a real stipulation and not mere words. Under clause 1, the guarantors are to pay "on demand ...". Since bank guarantees invariably specify that the liability of the guarantor is to pay on demand, the words are not devoid of meaning or effect but make the demand a condition precedent to suing guarantor ...

(see also: *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v. Kwong Yik Bank* [1989] 3 MLJ 155 – Supreme Court).

The plaintiff issued a total of three demands to the borrower and all the three guarantors respectively. The first demand was made on 2 April 1986, followed by the 2nd demand on 15 May 1986. The 3rd demand was made on 20 July 1993, after the 1st action against all the guarantors *vide* Kuala Lumpur High Court Guaman Sivil No: C1-23-3411-1986 was withdrawn with liberty to file afresh.

The 3rd defendant is contending that for the purpose of limitation period, time started to run from the failure of the 3rd defendant to comply with the 1st demand made on 2 April 1986. As the present action was only filed on 12 June 1996, the 3rd defendant argued that the period has exceeded six years and therefore the plaintiff's claim is time barred. The plaintiff, on the other hand argued that the 1st and 2nd demands respectively made on 2 April 1986 and 15 May 1986 were not in order and therefore invalid. The plaintiff also argued that the liability of the 3rd defendant did not arise as a result of the 1st demand made on 2 April 1986 because that demand merely calls for payment on overdue interest and not a demand for repayment of the loan. Thus, the plaintiff further contended that time should only run after the 3rd demand made on 20 July 1993 which the plaintiff considered as a valid demand.

The first demand on 2 April 1986 is reproduced in full below:

A.R. REGISTERED 6884-GEN/86(49)
2 April 1986

Nikseng Development Sdn Bhd (BORROWER)
No. 501 5th Floor
Wisma Central
Jalan Ampang
Kuala Lumpur

Nikseng Plantation Sdn Bhd (BORROWER)
No. 501 5th Floor
Wisma Central
Jalan Ampang
Kuala Lumpur

Encik Raja Abdullah Wahaman (GUARANTOR)
Bin Raja Sulaiman
5 Jalan 5/15G
Petaling Jaya

Mr. Nik Che Kok (GUARANTOR)
49 Jalan Jejawi
Bukit Bandar Raya
Kuala Lumpur

Mr. Goh Poh Seng (GUARANTOR)
26 Jalan Sentosa
Section 3/57A
Petaling Jaya

Dear Sirs,

Re FL 71492-6 & FL 71555-8 & 02-05445-3

We act for Public Bank Berhad of No. 6 Jalan Sultan Sulaiman Kuala Lumpur.

Our clients inform us that the following accounts maintained by you are outstanding:-

Account No	Facility	Amount Outstanding
FL 71492-6	Fixed Loan	$1,421,926.60 being overdue fixed loan interest as at 28.2.1986.
FL 71555-8	Fixed Loan	$340,657.75 being overdue fixed loan interest as at 28.2.1986.
02-05445-3	Overdraft	$189,856.78 being excess overdraft against an operative limit of $500,000 as at 28.2.1986.

Despite our clients' repeated reminders to you to settle the above outstanding sums, you have to date still failed, refused and/or neglected to do so.

TAKE NOTICE that unless you settle the above outstanding sums together with our notice fee of $900.00 within this next 14 days from the date hereof, our client will recall the entire facilities granted to you and we shall forthwith commence legal action without further notice.

Yours faithfully

Sgd.

c.c. PBB-CrCon/KLL/zz/nma/71492, 71555, 5445
c.c. Cr Con Dept, Head Office.

The same issue has already been dealt with by the Court of Appeal in *Nik Che Kok v. Public Bank Bhd.* [2001] 2 CLJ 157 where the 1st defendant had appealed against the decision of the judge-in chambers. The Court of Appeal has dealt with the same set of facts which arise from the same set of transaction involving the same letters of demand issued by the plaintiff to all the three guarantors. All the three letters of demand were duly considered by the Court of Appeal which accordingly has made the following conclusions:

Looking at the facts and circumstances of this case, we are of the view that the liability of the principle debtor as well as that of the guarantors arose from the first notice of demand dated 2 April 1986. For all intents and purposes it is a notice of demand failing which the respondent could have legally filed a suit against the principal debtor as well as against the guarantors. Conceded that the first notice of demand did not specify the precise amount owing but there is no general rule that such a notice must specifically mention the precise amount owing. We are of the view that a demand is for the purpose of bringing home to the debtor that the creditor is demanding its money. (See *O'day v. Commercial Bank of Australia* [1993] 50 CLR 200). It is our view that for the purpose of limitation, time began to run from the earliest time at which the creditor could have brought an action. In the present case the earliest that the Defendant could have commenced a suit was soon after issuing the notice of demand of 2 April 1986. On the facts of this case, we are of the view that since the suit was filed more than six years after the cause of action issued the suit is statute barred by virtue of s. 6(1)(a) of the Limitation Act 1953. In the premises we allowed the appeal with costs and ordered that the deposit be refunded to the appellant.

The decision of the Court of Appeal on this same issue is very clear. The plaintiff's application for leave to appeal the said decision to the Federal Court was dismissed by the Federal Court. Therefore the said decision was still in force. Even though the decision only relates to the 1st defendant, there is no reason why this court should not adopt the said decision as it was made based on the same set of facts, the same set of transaction and the same letters of demand as in the present consideration before this court involving the 3rd defendant. Both the 1st and the 3rd defendants are guarantors to the borrower in the same loan transaction involving the same letter of guarantee. The fact that the 3rd defendant did not appeal against the decision of the judge-in-chambers to the Court of Appeal does not mean that the said decision of the Court of Appeal cannot be adopted for the purpose of the 3rd defendant. In reversing the decision of the SAR, the judge-in-chambers did not at any time ruled specifically that the plaintiff's claim was not time barred. The decision of the judge-in-chambers is that there were triable issues and therefore, it was not a fit and proper case to strike out the plaintiff's claim. With that decision, the 3rd defendant is still at a liberty to raise the issue of limitation period before this court now.

The plaintiff's counsel submitted that the said decision of the Court of Appeal should not be followed because the letter of demand dated 2 April 1986 issued by the plaintiff was bad and invalid. This court cannot accept this submission as the same issue had already been considered and determined by the Court of Appeal in the appeal involving the 1st defendant earlier.

In his attempt to persuade this court not to follow the said decision of the Court of Appeal, the plaintiff's counsel in his submission went to the extent of saying that the Court of Appeal has failed to consider the relevant principles and authorities submitted by the plaintiff. The plaintiff counsel even submitted that the Court of Appeal has come to a wrong conclusion in its finding on the letter of demand. The relevant part of the plaintiff's counsel's submission is reproduced below:

> Tambahan pula, Mahkamah Rayuan dalam rayuan Defendan Pertama itu tidak menimbangkan prinsip-prinsip dan autoriti-autoriti yang dikemukakan di Perenggan 1.1. di atas ini langsung dan telah membuat anggapan yang tidak betul di m.s. 3 d-e dan 4 b-c IAD3 bahawa surat bertarikh 15.5.1986 itu adalah surat tuntutan tanpa menimbangkan atau dirujuk kepada isu-isu yang telah kami membentangkan di atas ini walaupun prinsip-prinsip dan autoriti-autoriti tersebut adalah mengikatnya kerana prinsip-prinsip itu berdasarkan keputusan Mahkamah Agung dan Mahkamah Persekutuan. Ini jelas dilihat pada m.s. 4 b-c "For all intents and purposes, it (iaitu surat bertarikh 2.4.86 yang meminta untuk pembayaran faedah sahaja) is a notice of demand failing which the respondent could have legally filed suit against the principal debtor as well as against the guarantors" dan jelas gagal mengambil kira kesan isu yang dibangkitkan dalam autoriti seperti *Dow Banking Corporation v. Mahkamah* atau *Mok Hin Wah v. UMBC* (sila lihat di atas ini). Kegagalan dasar fakta keputusan itu menjadikannya suatu panduan yang tidak patut diikuti oleh Yang Arif Tuan Hakim.

With respect, this court has to say that this line of submission is grossly improper and merits no consideration at all. The matter has been argued and dealt with by the Court of Appeal, where the plaintiff is a party. The Court of Appeal has made a decision. Their application for leave to appeal to the Federal Court has been dismissed. The said decision therefore stands. To put forward the above submissions before this court (which is inferior to the Court of Appeal) is not provided by any rules of procedure. It is not for this court to entertain and decide whether the Court of Appeal was right or wrong in coming to the said decision.

In the present case, following the said decision of the Court of Appeal, the liability of the 3rd defendant under the guarantee arose from the first demand dated 2 April 1986. That is the time when the plaintiff's cause of action against the 3rd defendant accrued ie, the time when the plaintiff could have legally filed a claim against the 3rd defendant. As has been said by the Court of Appeal, that "a demand is for the purpose of bringing home to the debtor (guarantor) that the creditor is demanding its money". The limitation period should run from "the earliest time at which the creditor could have brought

an action". In the present case the plaintiff filed an action against the 3rd defendant on 12 June 1996 ie, clearly beyond six years from the date of the first demand (2 April 1986).

On the above premise this court has no hesitation to rule that the plaintiff's claim against the 3rd defendant is time barred by virtue of s. 6(1)(a) of the Limitation Act 1953 which provides that no action founded on a contract shall be brought after the expiration of six years from the date on which the cause of action accrued.

On this ground alone, this court rules that the plaintiff's claim against the 3rd defendant be struck off with costs.

Issue Of Past Consideration

The 3rd defendant contended that the guarantee in question was not valid because of past consideration ie, the plaintiff had released RM4,000,000 of the loan (on 3 December 1982) before the said guarantee was signed by the 3rd defendant (on 29 December 1982).

The 3rd defendant, was, at the material times when he signed the guarantee, a director and shareholder of the borrower. The loan was granted to the borrower to enable the borrower to complete its housing project. In the offer letter dated 5 October 1982 (cl. 3(b) given by the plaintiff to the borrower, it was stated that the loan was "to be additionally guaranteed by all the directors of the company jointly and severally ...". The first RM4,000,000 was released by the plaintiff to Oriental Bank on request of the borrower for the purpose of discharging the land in question which was charged to Oriental Bank. It has to be done first before the said land can be charged again to secure the said loan granted by the plaintiff to the borrower. In the borrower's letter dated 23 June 1982 to the plaintiff, signed by the 3rd defendant (as a director of the borrower) the borrower admitted, *inter alia*, that "the land is presently charged to Oriental Bank Berhad for overdraft facilities of Ringgit Six Million ($6,000,000)". The said letter also states that the Borrower "wish to apply to your Bank (the Plaintiff) for overdraft facilities of Ringgit Six Million ($6,000,000) as bridging and construction finance to replace the loan granted to us (the borrower) by Oriental Bank Berhad." In another letter dated 27 October 1982, signed by the 3rd defendant as a director of the borrower, addressed to Oriental Bank Berhad, it is stated that:

> We have obtained a loan from Public Bank Berhad for our development under reference. As such we would like to pay back to you for the amount outstanding. Payment will be made by Public Bank Berhad.

All these letters, signed by the 3rd defendant as a director of the borrower, clearly showed that the 3rd defendant knew about the whole transaction right from the beginning when the borrower applied for the loan from the plaintiff, the purpose of the loan as well as the payment of RM4,000,000 made by the plaintiff to Oriental Bank to secure a discharge of the charge on the said land. The letters also indicate that the payment of RM4,000,000 made by the plaintiff to Oriental Bank to secure a discharge of the charge on the said land was made at the request of the borrower through the 3rd defendant who was a director at that material time. All these letters were dated before the loan was released to Oriental Bank and also before the 3rd defendant signed the guarantee.

The legal principle relating to past consideration was established as early as 1615 in the case of *Lampleigh v. Braithwait* [1615] Hobart 105, where it was held:

> First ... a mere voluntary courtesie will not have a consideration to uphold an assumpsit. But if that courtesie were moved by a suit or request of the party that gives the assumpsit, it will bind, for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit, which is the difference.

This principle was adopted by the Privy Council in the case of *Pao On v. Lau Yiu Long* [1980] AC 614, where Lord Searman held that "an act done before the giving of a promise could be valid consideration for that promise if the act had been done at the promisor's request."

In our Contracts Act 1950 s. 2(d) provides:

> (d) When, at the desire of the promisor, the promise or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.

In *South East Asia Insurance Bhd v. Nasir Ibrahim* [1992] 4 CLJ 1801; [1992] 1 CLJ (Rep) 295, then Supreme Court has held that the use of the words "has done or abstained from doing" as appear in s. 2(d) of the Contracts Act 1950, shows that our Contracts Act 1950, recognises the principle laid down in *Lampleigh v. Braithwait (supra)* ie, that past consideration is good consideration if it comes at the request of the promisor. It was further held in that case (*South East Asia Insurance Bhd v. Nasir Ibrahim*) that:

(2) The essence of consideration is that the promise has taken upon itself some kind of burden or detriment. The detriment undertaken by the promise, the appellant, which in this case is the giving of a guarantee to a third party at the request of the promisor, the respondent, is a past performance and should be sufficient consideration where there is a promise in consideration of some act previously done by the promise at the request of the promisor. In deciding whether consideration is past, the court should not take a strictly chronological view. If the consideration and the promise are substantially one transaction, as in this case, it should not matter in what order they are given. In order words, consideration itself accommodates past consideration so long as the 'desire' requirement is specified, that is the guarantee was given at the request of the indemnifier. As it can be proved that there was consideration, it can also be proved that the third party indemnity was valid.

Based on the above authorities, this court rules that, in the present case, the guarantee was valid even though it relates to past consideration.

Conclusion

Even though the answer to the 2nd issue is in the affirmative ie, the said guarantee in question is valid even though it relates to past consideration, the court has already held that the plaintiff's claim against the 3rd defendant is time barred by virtue of s. 6(1)(a) of the Limitation Act 1953. In the premise, the plaintiff's claim against the 3rd defendant is therefore struck off with costs.